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Conference

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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3 UNITED STATES OF AMERICA,

4 v.

16 Cr. 00019 PGG

5 MAALIK ALIM JONES,

6 Defendant.

7 -----x

8
9 July 6, 2016
10 10:16 a.m.

11
12 Before:

13 HON. PAUL G. GARDEPHE,

14 District Judge

15
16 APPEARANCES

17 PREET BHARARA,
18 United States Attorney for the
19 Southern District of New York
20 ANDREW JAMES DeFILIPPIS,
21 SEAN STEPHEN BUCKLEY,
22 Assistant United States Attorneys

23 THE LAW OFFICES OF SEAN M. MAHER, PPLC,
24 Attorneys for defendant Jones
25 BY: SEAN MICHAEL MAHER, Esq.
Of counsel

Also Present:
MARY BOESE, Special Agent FBI

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1 (In open court)

2 (Case called)

3 THE COURT: Mr. DeFilippis, what is the status of
4 discovery?

5 MR. DeFILIPPIS: At this time, the government has
6 completed its Rule 16 discovery and produced it to defense
7 counsel, your Honor.

8 THE COURT: All right. Mr. Maher, what is your sense
9 of what the future of the case is going to be?

10 MR. MAHER: As far as Rule 16, the last two discs were
11 produced I believe on June 17th, about two weeks ago. There is
12 an encryption issue we are still looking into, but I don't
13 think it will hold us up in any way.

14 The way I see it, the government informed the court it
15 intends to file a CIPA filing with the court, and it is a CIPA
16 filing the government says will not be shared with defense
17 counsel at all. I am cleared counsel. I have gone through
18 that, all the levels I think I need for this type of case, but
19 I don't know what the government is filing. I would like the
20 opportunity to file my own application to the court regarding
21 the government's ex-parte application.

22 In addition, there is an additional discovery demand
23 that I intend to make on the government which may implicate
24 classified information with the government, and that will be
25 for the government to decide. I think the most prudent thing

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1 at this point would be to give me a little bit of time to do
2 that. I have talked with the government. I think the
3 government was going to file in the first week of August. If
4 we could come back the week I believe of August 15th, I will
5 file my CIPA filing with the court before that and also make my
6 discovery demands on the government, and I think the government
7 anticipates they could at least give us a shorthand answer as
8 to where they think that leaves the government.

9 THE COURT: Mr. Maher, has some of the discovery
10 you've received so far, has that been redacted in some fashion
11 or not?

12 MR. MAHER: There are, off the top of my head, I think
13 there are some redactions. I am thinking about other things
14 that aren't in the Rule 16, but I think may be out in the
15 universe.

16 THE COURT: Let me talk with the government just a
17 second about how the CIPA process is going to work.

18 As I understand it, the government is going to be
19 making a filing on August 5th, and that filing is going to tell
20 me that certain materials were withheld, certain materials that
21 the defendant would otherwise be entitled to under the Federal
22 Rules of Criminal Procedure have been withheld because they
23 constitute classified information.

24 Is that the process?

25 MR. DeFilippis: Your Honor, we do intend to make a

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1 filing in which we seek the court's permission to withhold from
2 discovery material that not necessarily would be discoverable
3 under Rule 16, but that in an abundance of caution the
4 government could see an argument it would be. That is the
5 purpose of the motion, is to request that the court allow it to
6 withhold from discovery those materials.

7 THE COURT: Okay. And so, Mr. Maher, this filing that
8 you would make, you don't really know what they've withheld,
9 but you have got suspicions about what they withheld. Is that
10 what you're going to be addressing?

11 MR. MAHER: At this point, I anticipate two things
12 that I will be addressing:

13 One, I want to address the CIPA statute, particularly
14 the provision that permits the government to make ex-parte
15 applications when there is cleared counsel. I can understand
16 potentially when there is uncleared counsel, but when we have
17 cleared counsel and have criminal penalties such as myself if
18 we did anything to reveal that information, I think that the
19 constitutional protections for my client outweigh the
20 government's need for secrecy in those limited instances. That
21 is one aspect I would like to file with the court.

22 Then there are particularized requests that go beyond
23 the Rule 16 that have been provided to me that I would like to
24 make to the government, and I can't anticipate how they would
25 respond, so I don't really want to do that. I will defer that,

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1 your Honor.

2 THE COURT: Mr. DeFilippis, I am hearing from Mr.
3 Maher he has been through some kind of classified
4 information-clearance process. How does that impact what we
5 are going to be doing here?

6 MR. DeFilippis: Your Honor, we understand that he has
7 been through that process. However, the statute, Section 4 of
8 CIPA, specifically contemplates and prescribes the filings are
9 made ex-parte. The case law supports that. We are not aware
10 of cases in which it has been otherwise.

11 We don't see anything at all atypical or unusual about
12 this case that we think would warrant revisiting that or
13 contemplating any other outcome.

14 I would note, with regard to the Rule 16 discovery
15 which is complete, we did scour all of our usual sources, both
16 classified and unclassified, and any redactions in the
17 discovery were not redactions of classified material. They
18 were for other reasons, but in our view, there is no classified
19 discovery that should be produced to defense counsel in this
20 case.

21 THE COURT: All right. I will await the government's
22 submission and Mr. Maher's submission, and I am going to put it
23 down for a conference on August 16th, at 10:30, to discuss
24 these matters further.

25 MR. MAHER: Thank you.

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1 THE COURT: Is there an problem with August 16th, at
2 10:30?

3 MR. DeFilippis: Not from the government. We ask your
4 Honor order defense counsel to make its discovery request
5 within two weeks of today so we have time to address it before
6 the conference.

7 THE COURT: Mr. Maher, when can you get your discovery
8 request in, or the matters that you were mentioning you wanted
9 to ask the government about?

10 MR. MAHER: The specific discovery request, if I could
11 have, I would ask three weeks, July 27th.

12 MR. DeFilippis: That is fine with the government.

13 THE COURT: July 27th for the discovery requests, and
14 when are you going to make your application, Mr. Maher, related
15 to CIPA? Are you going to do that on the 27th as well?

16 MR. MAHER: I would ask for more time.

17 THE COURT: You want more time on that?

18 Well, yes, I guess the government is not filing their
19 application until the 5th, so does it make sense to have yours
20 due on the 5th as well?

21 MR. MAHER: That should make sense. I would still ask
22 if I could have the 12th for that, your Honor.

23 THE COURT: Okay. That doesn't give us a lot of time
24 before the conference, but so the schedule is July 27th for
25 discovery requests, August 5th for the government's CIPA

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1 filing, August 12th for whatever application Mr. Maher is going
2 to make about CIPA, and August 16th for the conference at
3 10:30. Does the government wish me to exclude time between now
4 and August 16th?

5 MR. DeFilippis: Yes, your Honor, so defense counsel
6 can continue to review discovery and prepare its motions, we
7 believe it is in the interests of justice.

8 THE COURT: Any objection, Mr. Maher?

9 MR. MAHER: No, your Honor. There is one matter I do
10 want to bring up.

11 THE COURT: All right.

12 MR. MAHER: That has to do with Mr. Jones' pretrial
13 conditions at the MCC. He has been incarcerated since December
14 18th, 2015 here in Manhattan. He has been in the Special
15 Housing Unit the entire time. It is my understanding basically
16 since after the first month of his incarceration he has been in
17 the 10 South unit, which is the most severe restrictive
18 pretrial detention conditions probably in the country.

19 He is basically in solitary confinement and has been
20 treated as if he were under special administrative measures,
21 though such measures have never been implemented. I have
22 brought this up to the government, and I think the government
23 stated to me they believe the SAM may be approved very quickly.
24 I don't want to put words in their mouth.

25 THE COURT: Who wants to address this for the

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1 government, Mr. DeFilippis?

2 MR. DeFilippis: Yes, your Honor.

3 As the defense counsel stated, there is a request for
4 Special Administrative Measures pending which we expect will
5 come through subject to the approvals in Washington quite soon.
6 We think it is likely it will be in place before the next
7 conference. The defendant's conditions of detention to date
8 have been based on the BOP's constant evaluation both of the
9 charges in this case, the nature of the defendant's alleged
10 conduct, and the security requirements at the MCC where he is
11 housed.

12 We have been in regular communication with the BOP,
13 and given the charges in this case, your Honor, which allege
14 that the defendant traveled to join an Al Qaeda aligned
15 terrorist group and received military training from them, the
16 BOP's determination to date, and U.S. Attorney's Office agrees,
17 the determination has been his current conditions are
18 appropriate, and we continue to believe they are.

19 THE COURT: All right. Let me say this to you, Mr.
20 Maher. If you continue to believe that the conditions of
21 Mr. Jones' pretrial detention are improper, you are welcome to
22 make a written submission, and then I will hear from the
23 government on it.

24 Mr. DeFilippis, with respect to these SAM measures
25 that you were talking about, tell me what that whole process is

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1 and what you expect to happen. I think you said you expected
2 some developments in that?

3 MR. DeFilippis: Yes, your Honor.

4 The request for the imposition of Special
5 Administrative Measures, which comes from the U.S. Attorney,
6 goes through various chains of approval in Washington. That is
7 now in progress. If and when they're approved, which we expect
8 they will be, it will essentially formalize and continue his
9 current conditions of confinement, again subject to the BOP and
10 DOJ consulting on any issues.

11 THE COURT: Is that a Main Justice process you're
12 talking about, you have to send something down to Main Justice
13 and have them approval it?

14 MR. DeFilippis: That's right, your Honor, that is a
15 decision that is made at headquarters.

16 THE COURT: So that would make formal what up till now
17 has been an informal imposition of restraints on the defendant
18 pursuant I guess to a Bureau of Prisons policy?

19 MR. DeFilippis: Yes, your Honor. They are approved
20 by the Attorney General. I don't know that the word "informal"
21 is right. The BOP makes it its own determination of the
22 appropriate conditions. We are able to formally request
23 Special Administrative Measures, but you're right, that it
24 would essentially continue those conditions. We have informed
25 the BOP previously of our intention to seek the imposition of

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1 SAMS and have described for them our rationale in doing so.

2 THE COURT: Does Main Justice issue some kind of
3 written findings?

4 MR. DeFilippis: Yes, there will be a memorandum with
5 actual procedures and administrative measures that would state
6 the basis for the imposition of them and the specific
7 requirements.

8 THE COURT: When do you expect that to come through?

9 MR. DeFILIPPIS: I wouldn't wouldn't to promise. We
10 are optimistic it will be in place before our next conference.

11 THE COURT: As I said Mr. Maher, it is up to you how
12 you wish to proceed on that. If you want to make a submission,
13 I will be happy to consider it. If you want to await what Main
14 Justice decides with respect to the SAM measures that Mr.
15 DeFilippis has told us about, you can take that approach,
16 either. It is entirely up to you when you seek to raise the
17 issue.

18 I am aware of the charges against the defendant, and
19 they certainly suggest that special measures are necessary, but
20 I am not prejudging the issue and you're welcome to make any
21 application you wish.

22 MR. MAHER: Thank you. I am appreciating that.

23 THE COURT: I will exclude time between today and
24 August 16th, our next conference, pursuant to Title 18 United
25 States Code Section 3161 (h) (7) (A), to permit defense counsel

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1 to continue review of discovery, also to make application with
2 respect to the Classified Information Procedures Act, and also
3 to consider whether there will be any pretrial motions in the
4 case and what the future of the case will be. I do find that
5 the ends of justice served by the granting of this continuance
6 outweigh the best interests of the public and the defendant in
7 a speedy trial.

8 Is there anything else we need to talk about today?

9 MR. DeFilippis: Not from the government, your Honor.

10 MR. MAHER: No, your Honor.

11 THE COURT: Thank you.

12 (Court adjourned)

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